United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1469

To be argued by
MICHAEL HARTMERE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1469

UNITED STATES OF AMERICA,
Appellee,

—v.—

HOWARD E. HAWLEY, JR.,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Statement of the Case

On March 18, 1976 a Federal Grand Jury sitting at New Haven, Connecticut, returned a true bill of indictment (N-76-43) charging the defendant, Howard E. Hawley, Jr., with a violation of Title 18, United States Code, Section 2113(b), in one count. The indictment charged that the defendant had wilfully and unlawfully taken and carried away, with intent to steal and purloin, money belonging to and in the care of the Connecticut Bank and Trust Company, New Haven, the deposits of which were then insured by the Federal Deposit Insurance Corporation.

On April 5, 1976 the defendant entered a plea of not guilty to the indictment.

Trial by jury commenced on August 23, 1976 in United States District Court, New Haven, before the

Honorable Jon O. Newman, United States District Judge. The jury trial concluded on August 25, 1976 and, after approximately two hours of deliberation, the jury returned a verdict of guilty.

On September 27, 1976, defendant was sentenced to the custody of the Attorney General for two years, to be suspended after sixty days of incarceration, and to be followed by a probation term of three years. A timely Notice of Appeal was filed and the defendant was released on a $1,000 non-surety bond pending this appeal.

Statutes Involved

Title 18, United States Code, Section 2113(b):

> "Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; . . ."

Federal Rules of Evidence, Rule 609:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Questions Presented

I. Did the Government present evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt?

II. Did the trial court err in admitting the felony conviction of the defendant solely for impeachment purposes?

Statement of Facts

On Saturday, December 13, 1975, at approximately 8:25 a.m., Miss Claudia Siegle, teller manager at the Connecticut Bank and Trust Company, 299 Whalley Avenue, New Haven, and Deborah Thomsen, a teller at the same bank, opened the bank for Saturday morning business. (Tr. 4-5*). Each picked up her metal cash box containing currency from one of the bank's vaults. Miss Siegle also picked up a cardboard box of reserve cash totaling approximately $7,300.00 and brought both the cardboard box and the cash box to her station for that day, the west side drive-in window. (Tr. 5). Miss Siegle placed the cardboard box on the floor of the drive-in teller's window next to a trash receptacle in order to keep the box out of public view. (Tr. 6). When Miss Siegle closed the bank at approximately 12:25 p.m. on December 13, she placed the metal cash box back into the vault but forgot the cardboard box containing reserve cash which was left on the floor of the west side drive-in teller's window. (Tr. 8).

Upon arrival at work on Monday, December 15, 1975, Miss Siegle realized that she had forgotten to place the cardboard box into the vault at closing on Saturday. Miss

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* References marked "Tr. " refer to the transcript of proceedings in the trial court.

Siegle went to the drive-in teller's window to retrieve the box and discovered that the cardboard box of reserve cash was missing. (Tr. 9). During December, 1975, the Connecticut Bank and Trust Company, 299 Whalley Avenue, New Haven, was insured by the Federal Deposit Insurance Corporation. (Tr. 29-30). An audit conducted by the branch manager on December 15 and 16, 1975, disclosed that $7,401.00 of the bank's funds were missing; however, the branch manager found no evidence of a forced entry when he arrived at work on December 15, 1975. (Tr. 34-36).

Earlier on Monday, December 15, 1975, the bank had been cleaned by a cleaning crew of three individuals, the defendant, one Willie Ransom, and their boss, Leroy Umstead. (Tr. 55). The three had cleaned the bank from approximately 6:00 a.m. to 8:15 a.m. that morning. (Tr. 55). Umstead was responsible for dusting and for washing the doors and windows, Ransom cleaned the basement lounge area of the bank, and the defendant, Howard Hawley, emptied all the trash receptacles, including those in the west side drive-in teller's booth. (Tr. 55-56; 84; 143-144). Umstead stated that the defendant had unexpectedly gone home that morning prior to the completion of the cleaning of the bank. (Tr. 70). Umstead also stated that the defendant had helped him clean the bank on approxmiately ten to twenty occasions during 1975. (Tr. 64).

Soon after the discovery that an amount of money was missing on December 15, 1975, bank officials summoned special agents of the Federal Bureau of Investigation. When the special agents arrived at the bank, the three members of the cleaning crew had returned. (Tr. 88). While proceeding to the basement area of the bank, the agents found and seized $3,010.00 of the missing bank funds. (Tr. 91). Special Agents David Cotton and John

Quinn, Federal Bureau of Investigation, secured the funds, contained within four money wrappers, and sent the wrappers and the top and bottom bill from each stack of money to the Federal Bureau of Investigation laboratory in Washington, D.C., for latent fingerprint examination. (Tr. 92). The fingerprints of each member of the cleaning crew, including those of the defendant, Howard Hawley, were taken by the agents and also forwarded to the Bureau of Investigation laboratory for possible comparison. (Tr. 92-93). Each member of the cleaning crew, including the defendant, denied having seen either bank funds or the cardboard box containing bank funds while cleaning the bank on that morning. Mr. Ransom and Mr. Umstead each stated that he had not been in the west side drive-in teller's window while cleaning on the morning of December 15, 1975. (Tr. 62; 84-85; 133). However, the defendant did admit that he had emptied the trash receptacles in the west side drive-in teller's booth on the morning of December 15, 1975. (Tr. 144).

Elman Robinson, a fingerprint specialist employed by the Federal Bureau of Investigation in Washington, D.C., developed a latent fingerprint on one of the money wrappers which had been sent to him for analysis. (Tr. 96). Agent Robinson determined that the latent fingerprint which he had developed from a $1,000.00 money wrapper (Government's Exhibit 2 at trial) and the left thumbprint appearing on the inked fingerprint card voluntarily provided by the defendant (Government's Exhibit 8 at trial) were impressions of the left thumbprint of the same individual and no other. (Tr. 96-100). Agent Robinson determined that the latent fingerprint of the defendant was in an upside down position at a slight angle between the two $1,000.00 markings on the money wrapper. (Tr. 100).

Miss Siegle had banded the $1,000.00 money wrapper on which the defendant's thumbprint was found by Agent

Robinson. The money wrapper was date stamped and initialed by Miss Siegle on December 8, 1975. (Tr. 9- 10). Miss Siegle's regular duty station was located in the general lobby area of the bank at the end of the teller's line and Miss Siegle was at her regular duty station on December 8, 1975. (Tr. 12-13). Miss Siegle kept her money wrappers in a metal box or tray (Government's Exhibit 5 at trial) on top of her counter at her regular teller's station. (Tr. 12-14). The metal tray containing money wrappers rested upon a wooden support (Government's Exhibit 4 at trial) which was used for other bank supplies. (Tr. 12). The metal tray contained six separate slots for money wrappers of differing denominations, the $1,000.00 money wrappers being kept in the second slot from the left; the money wrappers were always kept in the same position within each slot by Miss Siegle to facilitate her wrapping money. At trial, Miss Siegle demonstrated how money wrappers were used from the metal tray and how money was actually wrapped. (Tr. 15-17). Miss Siegle testified that on Monday, December 8, 1975, a money wrapper would stay on top in its slot for perhaps one or two hours. (Tr. 17-18). Miss Siegle also demonstrated the position of a $1,000.00 money wrapper within the metal tray, the metal tray having a cover so that only a portion of each denomination of money wrapper was visible, and reached into the $1,000.00 wrapper slot with her left hand, clearly showing that the placing of the left thumb into the position where the latent thumbprint of the defendant was discovered simply could not have been accomplished while the money wrapper was in the metal tray. (Tr. 18-19).

Subsequent to Agent Robinson's identification of the defendant's thumbprint on the $1,000.00 money wrapper, the defendant was re-interviewed by agents of the Federal Bureau of Investigation during February, 1976. (Tr.

107). When confronted with the fact that his thumbprint had been found on a $1,000.00 money wrapper containing part of the bank's missing money which he had previously denied seeing, the defendant stated that he did not believe his thumbprint was on there. (Tr. 108).

At trial, the defendant testified in his own behalf that he had found unused money wrappers on the floor of the bank while cleaning and placed them on tellers' counters. (Tr. 132). However, Miss Deborah Thomsen, the other bank employee on duty with Miss Siegle on Saturday, December 13, 1975 stated that money wrappers very rarely fell out of the metal tray, but that if one did, it was picked up immediately and placed back into the tray. (Tr. 153):

At trial, the defendant was impeached by evidence that he had been convicted of attempted burglary, a felony under Connecticut law, subsequent to the instant offense, but piror to trial. (Tr. 130).

The defendant, in this appeal, claims that the evidence against him was insufficient to prove guilt beyond a reasonable doubt as a matter of law, and that the trial court improperly admitted evidence of his felony conviction for impeachment purposes.

ARGUMENT

POINT I

The Government Presented Ample Evidence From Which a Reasonable Mind Might Fairly Conclude Guilt Beyond a Reasonable Doubt.

In the present case, as in any criminal case, constitutional due process required the Government to put forward and prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970). The burden of proof of guilt never shifts from the Government to the defendant. *United States* v. *Vigorito*, 67 F.2d 329, 330 (2d Cir. 1933), *cert. denied*, 290 U.S. 705 (1934). The defendant here contends that the Government failed to meet its burden of proof in that the evidence was insufficient to sustain defendant's conviction of a violation of Title 18, United States Code, Section 2113(c), bank larceny.

Generally, when a defendant appeals a conviction, the evidence must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974). The defendant, by asserting the evidence of his guilt was insufficient as a matter of law to sustain his conviction, argues that the trial court erred by failing to grant his motions for judgment of acquittal. The law is clear that where a defendant moves for a judgment of acquittal, the trial court must view the facts in the light most favorable to the Government. *United States* v. *Fench*, 470 F.2d 1234, 1242 (D.C. Cir. 1972); *United States* v. *Brooks*, 349 F. Supp. 168, 171 (S.D.N.Y. 1972). Thus, even where the facts equally support inferences of guilt

beyond a reasonable doubt or of innocence, a motion for judgment of acquittal must be denied by the trial court. *United States* v. *Bohle*, 475 F.2d 872, 875 (2d Cir. 1973). In reviewing the denial of defendant's motions for judgment of acquittal, this court should also view all of the evidence in the light most favorable to the Government. *United States* v. *Weston*, 466 F.2d 435, 437 (D.C. Cir. 1972).

Where a defendant has moved for a judgment of acquittal, the trial court must determine whether, upon the evidence, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); *United States* v. *Figueroa-Paz*, 468 F.2d 1055, 1058 (9th Cir. 1972). Even where the Government's case is entirely circumstantial, the evidence does not have to be such as to exclude every reasonable hypothesis other than that of guilt, and evidence must be viewed in light of the totality of the Government's case, since one fact may gain color from others. *United States* v. *Taylor*, *supra* at 244; *United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974).

Part of the evidence in the present case consisted of the testimony of a fingerprint expert of the Federal Bureau of Investigation to the effect that the defendant's left thumbprint was found on one of the money wrappers which contained part of the bank's missing funds. (Tr. 96-100). While it is true that a fingerprint alone is insufficient evidence of guilt unless it was left during the commission of the crime, *Borum* v. *United States*, 380 F.2d 595 (D.C. Cir. 1967), the Government contends that there was ample evidence presented to the jury from which to infer that circumstance.

During its case in chief the Government presented evidence that the defendant had been occasionally em-

ployed to clean the bank, having cleaned the bank approximately ten to twenty times during all of 1975. (Tr. 64). The Government also established that the $7401.00 missing on December 15 had been accidentally left out on the floor of the west side drive-in teller's window next to a trash receptacle on December 13, 1975 by Miss Siegle. (Tr. 8). Each member of the cleaning crew, including the defendant, agreed that the defendant had emptied all trash receptacles on the morning of December 15, including those in the drive-in teller's booth, and the other two members of the cleaning crew, Umstead and Ransom, denied seeing any money or the cardboard box containing the money, or for that matter, being in the west side drive-in teller's booth on the morning of December 15, 1975. (Tr. 55-62; 84-85; 143-144). The Government clearly established that the defendant alone had the opportunity to find and steal the money since the cardboard box of reserve cash had been left right beside a trash receptacle. (Tr. 8). The defendant later admitted that he had emptied the trash receptacle in the west side teller's booth beside which the box of money had been left. (Tr. 144-145).

Further, the Government presented uncontradicted evidence which totally negated any opportunity for the defendant to have touched the $1,000.00 money wrapper while it was contained within the metal box or tray atop the teller's desk prior to its use by the teller. This was accomplished through Miss Siegle who testified that money wrappers were always kept in the same positions within the tray and demonstrated that it was impossible to touch a $1,000.00 money wrapper between the markings since the tray has a cover. Miss Siegle also testified that on Monday, December 8, 1975 (the date the wrapper was used), a money wrapper would stay on top in its slot for perhaps one or two hours. (Tr. 15-19). When coupled

with the testimony of Elman Robinson, the fingerprint specialist of the Federal Bureau of Investigation, who demonstrated that he found the defendant's thumbprint in an upside down position and at an angle between the two $1,000.00 markings, (Tr. 100), the fact that the defendant could not have touched the money wrapper while it remained in the tray atop the teller's desk was clearly proven.

Moreover, the Government presented evidence that the defendant had gone home prior to the completion of the bank which seemed mysterious to defendant's employer since the two had planned to mate their dogs subsequent to cleaning the bank. (Tr. 70). This unexpected trip home was obviously a circumstance from which the jury could infer that the defendant had taken the money away from the bank and secreted it. Finally, when confronted with the fact that his thumbprint had been discovered on a money wrapper containing a part of the missing funds, after having denied seeing any money, the defendant told special agents of the Federal Bureau of Investigation that he did not believe his thumbprint was on there. (Tr. 108).

The Government thus submits that the jury was clearly presented with sufficient evidence from which they infer that the defendant left his thumbprint upon the $1,000.00 money wrapper while unlawfully removing the money from the bank on the morning of December 15, 1975. Judge Newman therefore was correct in denying defendant's motion for judgment of acquittal at the close of the Government's case.

The theory of the defense was that the defendant, while helping to clean the bank, had touched money wrappers which had fallen to the floor and placed them atop tellers' desks. Defendant testified that he had done so

"approximately every day" that he cleaned (Tr. 135, 139-141). This theory was presented in a rather general fashion since the defendant could not identify which teller's station was Miss Siegle's. (Tr. 141). In support of this theory, the defendant called as his witness Miss Deborah Thomsen, the other teller who had worked with Miss Siegle on Saturday, December 13, 1975. However, Miss Thomsen testified that in the cousre of her experience money wrappers "very rarely" fell out of the metal trays but if one did it was promptly replaced "because you had to keep everything neat". (Tr. 153).

The Government suggests that the trial court properly considered Miss Thomsen's and the defendant's testimony in deciding defendant's motion for judgment of acquittal subsequent to the jury verdict of guilty, since the defendant waived any objection to the sufficiency of the Government's case alone by introducing evidence on his own behalf. *McGautha* v. *California*, 402 U.S. 183, 215-216 (1971); *United States* v. *Rosengarten*, 357 F.2d 263, 266 (2d Cir. 1966). Thus, this court should now consider all the evidence, including the defendant's evidence which strengthened the Government's case. *United States* v. *Haskell*, 327 F.2d 281, 282 n.2 (2d Cir. 1964).

The evidence presented to the jury in the present case obviously demonstrated the money wrapper upon which the defendant's thumbprint was found had been virtually totally inaccessible to the defendant prior to the morning on which the money was stolen, even though the defendant had cleaned the bank on other occasions. This inaccessibility to the money wrapper was proven through the testimony of the fingerprint expert as to the position of the print on the wrapper, the testimony of Miss Siegle as to the use of money wrappers, their location atop her desk, and the storage of this particular money wrapper in the bank vault between December 8, 1975 (the date

of wrapping) and December 13, 1975, and the testimony of Miss Thomsen that wrappers infrequently fell to the floor but were promptly replaced into the tray when this did occur. The law is clear that where inaccessibility to the object in question has been demonstrated, as in the present case, fingerprint evidence is sufficient for conviction. *Stevenson* v. *United States*, 380 F.2d 590 (D.C. Cir.), *cert. denied*, 389 U.S. 962 (1967); *United States* v. *Jones*, 433 F.2d 1107 (D.C. Cir. 1970); *United States* v. *Cary*, 470 F.2d 469 (D.C. Cir. 1972). In this regard, it is not necessary that the Government prove to a mathematical certainty that the defendant touched the object during the commission of the crime, but only that the Government negate some of the most reasonable explanations for the prints consistent with innocence. *United States* v. *Stevenson*, *supra* at 595. (Bazelon, C.J., concurring opinion).

Additionally, the Government in the instant case presented evidence that the defendant had unexpectedly left the bank, ostensibly to take his dog home, prior to the completion of the cleaning of the bank. The defendant's employer, Mr. Umstead, testified that this seemed "mysterious" since they had planned to mate their dogs that day at Umstead's home. Certainly, this evidence can properly be viewed as further circumstantial evidence of the defendant's guilt since he was the only member of the cleaning crew to leave the bank alone, thereby affording the defendant an opportunity to carry away and secrete the stolen money. Fingerprint evidence coupled with other evidence tending to show guilt has been held sufficient to support a conviction. *Mikus* v. *United States*, 433 F.2d 719 (2d Cir. 1970); *United States* v. *Roustio*, 455 F.2d 366 (7th Cir. 1972).

The Government contends therefore that during the course of the trial it was proven that the defendant's left

thumbprint was found on a money wrapper containing part of the missing funds of the bank, that the money wrapper was inaccessible prior to the time of the offense, and finally that the defendant unexpectedly left the bank prior to the completion of the cleaning. Clearly there was sufficient evidence presented from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt in this case.

POINT II

The Trial Court Properly Admitted Evidence of the Defendant's Prior Felony Conviction Solely for Impeachment Purposes.

The defendant contends that the trial court erred in admitting evidence of his prior felony conviction under Connecticut State law solely to impeach his credibility as a witness.[1] The defendant's argument is clearly without merit.

Rule 609(a) of the Federal Rules of Evidence, Title 28, United States Code, states:

> "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year

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[1] Defendant had been convicted of the felony of attempted burglary on April 23, 1976. The burglary incident took place approximately one month after the instant offense of bank larceny and approximately five months prior to this trial. No issue is raised concerning that offense's classification as a felony under the Federal Rules. (See Appellant's Brief, p. 17).

> under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

Prior to the presentation of his case, the defendant moved, out of the presence of the jury, to exclude the use by the Government of the defendant's recent felony conviction. In support of his motion, the defendant relied on *United States* v. *Jackson*, 405 F. Supp. 938 (E.D.N.Y. 1974), a recent decision by Judge Weinstein (Tr. 125-126). In *Jackson*, the defendant made pre-trial motions for advance evidenciary rulings, one of which was to exclude the use for impeachment of a recent state felony conviction for assault. Defendant's reliance upon that case in support of his motion was obviously misplaced.

After a thorough discussion of the legislative history of Rule 609(a), Federal Rules of Evidence, Judge Weinstein addressed the problem of the application of the rule as follows:

> "It is apparent that, in its compromise form, the Rule necessarily embodies both the policy of encouraging defendants to testify by protecting them against unfair prejudice and the policy of protecting the government's case against unfair misrepresentation of an accused's non-criminality. It is incumbent upon the courts, in administering Rule 609(a), to reconcile these competing goals to the extent possible.
>
> Considered in the abstract, prior assaultive conduct would seem to have little bearing on the likelihood that one will tell the truth. At the same time, the knowledge that the defendant is a recently convicted felon might have an unduly sig-

> nificant impact on the jury's determination of whether the defendant committed an armed bank robbery even though the evidence would not be admissible for that purpose. See Federal Rules of Evidence, Rule 404(b). The availability of surveillance photographs and some identification testimony ensures that the case will not come down to a simple test of the credibility of two witnesses —the co-conspirator and the defendant. *The government's case, therfore, will not necessarily hinge on its ability to destroy the defendant's credibility.* Accordingly, defendant's motion to exclude his state court conviction is granted." (Emphasis supplied). *United States* v. *Jackson*, *supra*, at 942, 943.

Moreover, the *Jackson* decision was specifically conditioned on the defendant's refraining from suggesting to the jury either that he had never been in trouble with the law or that he had a pristine background. *Id.* In the present case, the defendant did suggest to the jury that he was a totally honest man, even to the point of meticulously replacing small coins which had dropped to the floor in the bank. The defendant so testified both on direct and cross-examination, after he had disclosed his prior felony conviction. (Tr. 132-133; 145). Additionally, in the instant case the defendant testified that he frequently replaced unused money wrappers which had fallen to the floor behind the tellers' desks which was in direct contradiction to the testimony of other witnesses including one of the defendant's witnesses. Credibility, then, was certainly a major issue in this case, and the Government submits that the jury was clearly entitled to know that the defendant alone among the witnesses was a convicted felon.

A. Admissibility Under Rule 609(a)(2)

A trial judge has no discretion to exclude a prior felony conviction, offered to impeach credibility, which involves "dishonesty or false statement, regardless of the punishment", assuming that the use of the particular conviction is not barred by any other subdivision of Rule 609. The Conference Committee Notes shed some light on what the Committee meant by a conviction involving dishonesty or false statement:

> "By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or fake pretense, *or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.*" (Emphasis supplied)

Under the existing caselaw in this Circuit, when read in conjunction with Rule 609(a)(2), the Government contends that the defendant's prior conviction for attempted burglary was automatically admissible for impeachment purposes.[2] Indeed, when moving to exclude his prior conviction, defendant stated: "I don't believe

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[2] Defendant contends that Rule 609(a)(2) "effects two changes in prior law of this Circuit" and cites as authority for that proposition *Kaufman* v. *Edelstein*, 539 F.2d 811 (2d Cir. 1976) and *United States* v. *Zubkoff*, 416 F.2d 141, 143 (2d Cir. 1969). The Government would merely point out that *Kaufman* and *Edelstein* does not deal with Rule 609, and that *United States* v. *Zubkoff* deals only with Rule 609(b), the time limitation of ten years for use of a conviction under the then Proposed Rules. The defendant has cited no other authority for his proposition. (Appellant's Brief, pp. 19-20).

that this prior felony conviction necessarily notes dishonesty, such as a perjury conviction might . . ." (Tr. 126). Assuming, *arguendo*, that the crime of burglary might not in every instance reflect on honesty, the Government maintains that in this instance it would since the defendant was convicted of attempting to burglarize a grocery store. (Tr. 130). The defendant here testified that he attempted to break into the grocery store because he was on welfare and needed food. (Tr. 131). The defendant's attempted burglary was obviously an attempt to enter with the intent to steal, and, therefore, bore directly on the defendant's truthfulness. *United States* v. *White*, 427 F.2d 634, 635 (D.C. Cir. 1970). In *Gordon* v. *United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), then Judge Burger wrote:

> ". . . In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity . . . A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; . . ." *Id.* at 940.

The law in this Circuit is in accord with the principle that larceny or stealing is a crime which reflects on honesty and integrity and therefore on credibility and this Court has consistently so held. *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971); *United States* v. *Palumbo*, 401 F.2d 270, 274 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969).

The Government maintains that the defendant's prior conviction for attempted larceny bore directly on his honesty and on his propensity to testify truthfully, and was, therefore, automatically admissible under Rule 609 (a)

(2). Nothing in Rule 609 changes the law as to which crimes are in the nature of *crimen falsi*. The Government submits that the defendant's conviction involved deceit and untruthfulness and bore on the defendant's propensity to testify truthfully, and was automatically admissible.

B. Admissibility Under Rule 609(a)(1)

In any event, the conviction was admissible under Rule 609(a)(1) since the probative value of the defendant's attempted burglary conviction, as to his credibility, greatly outweighed any potential prejudice to the defendant.

The Court's decision in *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965), ultimately emerged as the prototype for Rule 609(a)(1), requiring the trial judge to exercise his discretion in admitting evidence of a crime for credibility purposes. 3 *Weinstein's Evidence*, Paragraph 609[03] at 609-64 (1975). The application of the *Luck* doctrine was clarified in subsequent decisions of the District of Columbia Circuit, especially in *Gordon* v. *United States*, *supra*. For weighing probative value against potential prejudice to a defendant, then Judge Burger, writing for the Court in *Gordon*, determined that the factors to be considered by the trial judge included the nature of the crime, the time of conviction and the defendant's subsequent history, the similarity between the past crime and the crime charged, the importance of the defendant's testimony, and the centrality of the credibility issue. *Weinstein's Evidence*, *supra*, at 609-68 to 609-80.

Defendant here contends that the "trial judge did not properly apply Rule 609, although the issue was clearly presented to him in those terms" and that the trial judge

abused his discretion by ruling "without considering the particular arguments raised before him." (Appellant's Brief pp. 18, 20). The Government submits that the trial judge adhered to both the letter and spirit of Rule 609 by hearing arguments on the issue out of the presence of the jury, carefully weighing probative value against prejudice, and finally, by clearly stating his reasons for ruling that probative value outweighed any possible prejudice. (Tr. 125-128).

Of the five factors which should be considered by the trial court prior to allowing a felony conviction into evidence under Rule 609(a) and the *Luck* doctrine, the trial court here considered all before ruling. Counsel for both sides presented arguments for and against admissibility, and after hearing the arguments, the trial court announced its reasons for allowing use of the conviction for impeachment purposes. For the defendant to argue that the trial judge failed to consider the arguments presented to him simply because the ruling went against the defendant is patently unfair and unsupported by the record.

That the court considered the nature of the crime and the time of the conviction is evidenced by the trial judge's statement, after hearing the arguments, that "This is recent and it's not trivial . . ." (Tr. 128). There is no question that the defendant's attempted burglary conviction is the type of crime that weighs heavily on one's honesty and ability to testify truthfully. *United States* v. *DeAngelis*, *supra* at 1009; *United States* v. *DiLorenzo*, *supra* at 220; *United States* v. *Gordon*, *supra* at 940. There is also no question of remoteness of time of the defendant's conviction since the offense occurred approximately one month after the instant offense and the conviction occurred approximately five months prior to trial. *cf. United States* v. *Palumbo*, *supra*.

That the court's ruling to allow impeachment by prior conviction did not preclude the defendant from testifying is obviated by the fact that the defendant did testify at trial. (Tr. 130-151). Indeed, in a situation where the trial court had ruled that the defendant could be impeached with two convictions for the same crime as that on trial and the defendant declined to testify, no abuse of discretion was found. *United States* v. *Rucker*, 496 F. 2d 1241 (8th Cir.), *cert. denied*, 419 U.S. 965 (1974). See also *United States* v. *Christophe*, 470 F.2d 865 (2d Cir.), *cert. denied*, 411 U.S. 964 (1972).

The defendant claims that at trial the Government argued for the admission of defendant's conviction since it "was probative on the issue of credibility because it involved stealing and was similar to the crime charged". (Appellant's Brief pp. 21-22). Again, the defendant's argument is simply not supported by the record. (Tr. 126-127). The Government did inform the trial court that the offenses were somewhat similar since the defendant had not so informed the court, but did so in the context of informing the trial court that the Government was not claiming a subsequent similar act to show motive or intent.[3] (Tr. 127). It is clear that the Government was not arguing admissibility because of similarity.

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[3] A portion of the Government's argument reads as follows:
"The defendant, when he takes the witness stand, will be the only one with a felony conviction. I assume, based on the defense request for instructions, that they want to place high value on his testimony. I think the jury is entitled to know that he is a convicted felon and I think burglary is close enough to the offense here to be considered to that effect.
"We only want the conviction for credibility, however.
"I am not claiming any prior similar act or subsequent similar act, however, I don't think it should be taken away from the jury on that basis . . ." (Tr. 126-127).

While similarity is one of the factors to be considered by the trial court, similarity between the offense charged and the prior conviction is by no means a bar to the use of the prior conviction for impeachment. In *United States* v. *Wilson*, 536 F.2d 883 (9th Cir. 1976), the Court affirmed a bank robbery conviction where the defendant had been impeached with two prior convictions for attempted robbery and receiving stolen property. Similar offenses have consistently been held admissible for impeachment purposes. *United States* v. *McMillian*, 535 F.2d 1035, 1039 (8th Cir. 1976); *United States* v. *Hatcher*, 496 F.2d 529 (9th Cir. 1974), (three Dyer Act convictions used to impeach the defendant in a Dyer Act trial). The defendant here subsequently argued against admission based on similarity, however, that argument was considered and explicitly rejected by the trial court. (Tr. 127-128).

One of the more important factors, argued by the Government (see f.n. 3 *supra*) and considered by the trial court, was centrality of the credibility issue in the present case. As noted earlier in this brief, the defendant's testimony was in direct contradiction to the testimony of other witnesses, including a bank teller called by the defendant. Prior to ruling on the admissibility of the defendant's conviction, the trial court was specifically informed that the defendant was the only witness who was a convicted felon. Where a case has narrowed to the credibility of the witnesses, evidence, including a defendant's criminal record, which would shed light on which of the witnesses is to be believed should be fully explored. *Gordon* v. *United States*, *supra* at 941; *United States* v. *Jackson*, *supra* at 942, 943; *United States* v. *Russo*, 540 F.2d 1152, 1156 (1st Cir. 1976). Under the circumstances of the present case, with credibility so key an issue, as the Government had argued to the trial court, the defendant's prior felony conviction certainly had great

probative value, totally outweighing any potential prejudice to the defendant. *United States* v. *Reed*, 526 F.2d 740 (2d Cir. 1975).

In the present case, the trial judge followed all of the proper procedures for weighing probative value against prejudice dictated by Rule 609 and exercised his discretion in favor of admission of the evidence. *cf. United States* v. *Mahone*, 537 F.2d 922, 928 (7th Cir. 1976) (no error even where no explicit finding that probative value outweighed prejudice).

The Government strongly suggests that the trial court properly exercised its discretion in making its determination and that this is clearly not a case evidencing an abuse of discretion.

CONCLUSION

The Government respectfully submits that there was ample evidence presented from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt and that the trial court properly admitted evidence of the defendant's prior felony conviction. Therefore, the defendant's conviction should be sustained.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-1469

U S A,
APPELLEE

v.

HOWARD E. HAWLEY, JR.,
APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, N. Y. 10023

That on the 5th day of January, 1977, deponent served the within Appeal Brief upon Andrew B. Bowman, Chief Federal Public Defender, 770 Chapel Street, New Haven, Connecticut 06510

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 5th day of January, 1977

Pierre L. St. Pard

PIERRE L. ST. PARD
Notary Public, State of New York
No. 24-4504294
Qualified in Kings County
Commission Expires March 30, 1977